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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH ENRIQUE PULIDIO, Defendant and Appellant.	A153886 (Contra Costa County Super. Ct. No. 5-171784-2)

Defendant Joseph Enrique Pulidio appeals a judgment convicting him of attempted burglary. He contends the trial court erred in deciding to excuse one juror and not others, in admitting testimony by the prosecution's fingerprint expert, in failing sua sponte to conduct a hearing regarding his ability to pay certain fees and fines imposed at sentencing, and in failing to maintain impartiality when questioning witnesses. Defendant also contends the prosecutor committed misconduct in closing arguments and that the abstract of judgment should be amended to reflect additional custody credits. We agree that the abstract of judgment should be amended but affirm the judgment in all other respects.

Background

Defendant was charged with a single count of residential burglary (Pen. Code, §§ 459, 460, 664). At trial, the homeowner testified that someone entered his home without his permission and stole a number of items, including a television and a laptop computer. It appeared that the burglar entered from a window in the rear of the home. Finger and palm prints recovered from a window screen frame in the rear of the home

were processed and matched to defendant. The jury convicted defendant of the lesser included offense of attempted burglary.

The trial court imposed an aggregate sentence of 13 years 4 months based on his convictions in a Santa Clara County case and in this case as follows: 12 years 8 months for Santa Clara County case No. C1357058 (two years for first degree burglary consecutive to 10 years for a gang enhancement and eight months for participating in a criminal street gang) and a consecutive eight-month term for this case. The court awarded 529 days of credit for time spent in custody before defendant's conviction in the Santa Clara case and imposed, among other fees and fines, a restitution fine of $840. Defendant timely filed a notice of appeal.

Discussion

1. *The trial court did not abuse its discretion in excusing Juror No. 8, retaining Juror No. 14, or failing to question the jury regarding alleged misconduct by an unknown juror.*

A defendant has a constitutional right to a unanimous verdict by a fair and impartial jury. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16; see also *People v. Engelman* (2002) 28 Cal.4th 436, 442.) Consistent with this constitutional right, a trial court may discharge a sworn juror only if "a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor." (Pen. Code, § 1089.) The trial court " 'must determine whether good cause exists to discharge the juror, and its reasons for discharge must appear in the record as a demonstrable reality.' " (*People v. Landry* (2016) 2 Cal.5th 52, 89.) The trial court's decision to discharge a juror is reviewed for abuse of discretion. (*People v. Smith* (2005) 35 Cal.4th 334, 348-349.)

A. Juror No. 8

After the prosecutor's closing argument on Thursday, November 9, Juror No. 8 sent the court a note asking for permission to leave for the day because his wife was taking their five-year-old son to the hospital. In response to the court's questions, the juror explained that his son had been home sick for a few days and that his wife had

decided to bring the child to the doctor because he was "very lethargic" and unresponsive. The juror acknowledged that his wife was proceeding "very cautiously" but believed that his son's condition was "sufficiently concerning" that he should not have to stay. Defense counsel suggested the court excuse the jury for the afternoon and delay replacing the juror until the following Monday if necessary. The prosecutor indicated her preference would be to replace the juror at that time and continue with the closing arguments. The court excused the juror and replaced him with the sole alternate. The court explained, "First of all, this has been a relatively short trial. The jury as a group has expectations in reference as to how long this trial would last. There would be an increased chance that this trial would last somewhat longer given the uncertainties here involved in waiting for [this juror to return]. He's got a sick child. Nobody knows how long the child will be sick or whether or not his attention is going to be needed through even Monday which would be the next day we would have to resume this trial. [¶] I'm very reluctant to interrupt closing arguments right here and now and essentially have the jurors have three full days between the first argument and the last two arguments. I think it's a much better situation when all the arguments are heard once [and] the jury retires to deliberate immediately."

We find no abuse of discretion in the court's decision. (See *People v. Bell* (1998) 61 Cal.App.4th 282, 289 [no abuse of discretion where "court conducted an adequate inquiry into good cause, and caring for a sick or injured family member surely constitutes good cause"].) Although the court might have waited until Monday morning before excusing the juror, its decision not to do so was based on valid grounds and certainly was not an abuse of discretion. (*Ibid.*)

B. Juror No. 14

On Thursday afternoon, November 9, the court gave final instructions to the jury before the bailiff accompanied them to the deliberations room. As the jurors exited the courtroom, the court addressed one juror, stating, "Sir, I don't want you addressing anybody again." After the jury had left, the court asked the attorneys if they had heard what the juror said. The prosecutor indicated that she believed the juror was directing his

comment towards her and that he had said "I don't appreciate you looking at – getting in my face." Counsel and the court agreed to revisit the issue on Monday morning after the prosecutor had a chance to think about her recommended course of action.

On Monday, November 13, the court met with both attorneys outside the jury's presence. The prosecutor suggested that the best way to handle the situation would be for the court to ask the juror about his comment and whether that comment would affect his duty to objectively evaluate the evidence and make a decision, and to readvise him that attorney comments are not evidence and are not to be taken personally. The court agreed and questioned the juror. The court informed the juror that his "possible comment to at least one of the lawyers or perhaps both" caused the court concern about whether his deliberations may be affected by something one of the lawyers may have done during the trial. The court reminded the juror that perception of a lawyer's performance should not affect the outcome of the case and asked whether the juror thought he could "still give both sides a fair shake in terms of [his] deliberations." The juror stated he "believed so" and offered to explain "what happened." The court responded, "My interpretation of it was that you did not like something about how counsel performed during the closing arguments and, therefore, were expressing some criticism of that sort of personal behavior." The juror confirmed the court's interpretation was "close but yeah." The court indicated that it did not want to "get into a detailed discussion" about what had happened because it did not want to have their conversation affect how the juror might deliberate. The court asked for confirmation that the juror was certain that he could render a fair decision based on the evidence in the case. The juror represented that he was "positive" he could render a fair decision based on the evidence. The juror added, "I apologize for saying – I didn't realize what was happening at the moment and I realize now that I wasn't supposed to say anything so I apologize to the court."

After the juror left the courtroom, the prosecutor and defense counsel both indicated that they were satisfied with the court's questioning. The court found no reason to remove the juror. The court explained, "I think his answers were reasonably satisfactory that he's alleviated any strong concern that I have about what happened

might affect him as a deliberating juror. So I'm satisfied to let the jury continue on with their deliberations." Defense counsel stated that she "agreed."

On appeal, the Attorney General correctly argues that defendant forfeited his challenge into the adequacy of the trial court's inquiry by not requesting the court to ask additional questions when given the chance. (See *People v. Bell* (2019) 7 Cal.5th 70, 120 [defendant forfeited claim that the court did not conduct an adequate inquiry into the prejudicial effect of defendant's courtroom outburst where court specifically invited defense counsel to question the jury further about potential bias, and he declined].)

In any event, even if the matter has not been forfeited, the court's decision not to obtain a further explanation from the juror was clearly within the scope of its discretion. "In general, the 'court must conduct a sufficient inquiry to determine facts alleged as juror misconduct "whenever the court is put on notice that good cause to discharge a juror may exist." [Citation.]' [Citations.] . . . The decision whether, and to what extent, investigation into possible juror bias is required ' "rests within the sound discretion of the trial court." ' " (*People v. Bell, supra,* 7 Cal. 5th at p. 120.) For example, "less formal inquiry" may be adequate to determine whether good cause exists to discharge a juror when the allegation is other than that a juror has personal knowledge of a fact in controversy. (*People v. McNeal* (1979) 90 Cal.App.3d 830, 837.) Here, the court questioned the juror and received sufficient assurance that the situation would not impact his deliberations. As in *People v. Kaurish* (1990) 52 Cal.3d 648, 694, the juror's comment can properly be characterized as an expression of "momentary exasperation with the proceedings" rather than a reflection of bias.

C. *Misconduct by Unknown Juror*

On Monday, November 13, the jury sent note number 5 to the court, stating, "One juror has a moral bias with respect to the law involving first degree residential burglary." Over defense counsel's objection, the court responded to the jury in writing: "It is difficult to respond helpfully to this note because the term "moral bias" is not very specific. We may be able to respond if we received some more specific definition about what the issue may be. [¶] You may recall that when the jury was selected you all agreed

that you would follow the law as provided to you whether you agreed or disagreed with that law. You are reminded that your obligation continues to . . . impartially and fairly follow the law as provided to you by my instructions." The court then received jury note number 6 stating, "Because 'residential burglary' qualifies as a second/third strike offense, for moral reasons (based on pas[t] experience as a juror) this juror cannot convict the defendant [of] these crimes." The court observed that the note suggested the juror was violating the legal instruction by considering punishment and again over defense counsel's objection, the court replied, "Note #6 contemplates that a juror has gained information about possible later punishment following a conviction for first degree burglary. There was no such evidence at this trial. [¶] Juror instruction #3550 specifically admonishes you that possible punishment that may follow from this case is not to be considered in rendering a verdict. You are reminded that your verdict must be based solely on the evidence." Shortly thereafter the jury returned a verdict finding defendant guilty of attempted burglary.

Defendant contends the court erred in failing to investigate and discharge the juror who was contemplating punishment during deliberations. Given the circumstances, the court did not abuse its discretion. (See *People v. Dykes* (2009) 46 Cal.4th 731, 812 [court did not abuse discretion in concluding that investigator's unsworn report of statements by jurors concerning the possibility of defendant's release from prison and speculation concerning punishment did not require evidentiary hearing].) The court's admonishment to the jurors that they were not to consider punishment and were to consider only the evidence presented was sufficient to protect against any potential misconduct. (*People v. Lavender* (2014) 60 Cal.4th 679, 687 [reminder to jury of its duty not to consider defendant's failure to testify was "strong evidence that prejudice does not exist."].)

2. *Expert testimony regarding verification of fingerprint identifications was properly admitted.*

The prosecution's fingerprint expert testified generally about the process used by analysts in Contra Costa County to identify fingerprints and specifically how she identified the fingerprints in this case. With respect to the process generally, she testified

that fingerprint analysts in Contra Costa County follow the ACE-V method, which includes verification of the analyst's results as the final step. She explained that the second analyst reaches a conclusion and "if both conclusions agree," they move forward to document the conclusions as one. After describing the process she used to match the prints in this case with defendant, the prosecutor asked whether her conclusion had been "verified . . . as a regular course of business." Defense counsel objected and following an unreported sidebar discussion, the expert did not answer the question. On cross-examination, defense counsel questioned the expert about studies that cast doubt on the reliability of fingerprint identification due to a high error rate. On redirect, the expert explained that the negative studies identified by the defense were flawed in part because some of the "comparisons were not verified by another analyst." When the studies were redone with all comparisons being verified, fewer errors were found.

Following the expert's testimony, the court made a lengthy record of its rulings regarding the expert's testimony on verification. The court explained, "So, during the course of cross-examination, the witness was asked about studies that may tend to show the imperfections of fingerprint identifications made by persons who might testify at a trial as experts. And . . . at least with respect to one if not both of those studies, the suggestion was made to [the witness] about the rate of error that resulted from these studies. [The witness] . . . addressed some particular reasons why the rates of error noted in the studies might be subject to some criticism. . . . [¶] . . . [O]ne of the points that she made was that, in her view, the studies themselves were flawed to a certain degree and the error rates thus affected by those flaws. And she pointed out, for example, that the studies were conducted without the V part of the ACE-V procedure. [¶] So I discussed that with counsel at a sidebar and I . . . said that I would allow counsel to ask, to limited extent, whether or not the V part of that procedure which was not present in the study was present when she, in fact, engaged in her analysis. And that could affect the jury's view . . . of whether or not the error rates that you wanted to suggest to the jury were possible error rates that might apply to her analysis . . . . [¶] So I understand that I had previously ruled . . . that counsel for the People could not ask specific questions about the

verification itself. I was allowing questions about the general process, not the about the verification in particular that may have been done in this particular case including, for example, who it was at the lab that reviewed it, what position that person has at the lab . . . . [¶] In the court's view, while it had to be concerned about where a line might be drawn in terms of what would be improper hearsay . . . I did the best I could. Once the defense's cross-examination suggesting error rates from those studies was placed before the jury, I think the People are entitled to have the jury understand what this witness was saying about the statistical significance of what those studies showed." Defense counsel stated that she had "concern about [the expert] being entitled or allowed to talk about verification occurring because that in itself . . . was a form of hearsay . . . because she did not herself do the verification." Defense counsel added, "by saying that she followed the verification process and the crime lab did. She implied . . . the hearsay evidence, which is someone did that verification process." The court stated it "agree[d] that there's an implication in that testimony" but indicated that it had "allowed that implication before the jury" because defense counsel opened the door on cross-examination.

On appeal, defendant acknowledges the expert did not explicitly say "yes, my results were verified." He argues, however, that by testifying that the standard procedures utilized in her laboratory required validation, the jury could infer that the expert's identification in this case had been validated by a second analyst. While such an inference is possible, we agree with the trial court that defendant opened the door to this testimony by presenting the negative studies on fingerprint identification. The expert was entitled to explain factors that she considered reduced the significance of those studies and did not undermine the opinion to which she testified. (See *People v. Carpenter* (1999) 21 Cal.4th 1016, 1062 [holding that "[t]he right to present a defense . . . , including expert testimony, does not include the right to present evidence free from rebuttal by contrary expert testimony" and that a "defendant may argue that the court should not have allowed the witness to testify at all, [but] he may not assert that testimony he elicited himself was itself inadmissible"].)

In any event, any potential infringement on defendant's confrontation rights was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The expert personally performed the fingerprint comparison, testified to that comparison, and was cross-examined extensively about the basis for her opinion. Neither the expert nor the prosecutor in closing argument suggested that the expert's opinion and explanation should be accepted because verified by a second expert. There is no reason to assume that the jury's evaluation of her testimony was based on the passing reference to verification.

3. *The prosecutor did not commit misconduct in closing argument.*

Defendant contends the prosecutor's closing argument misstated the law, trivialized the reasonable doubt standard and lowered the burden of proof. "A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury. Furthermore, and particularly pertinent here, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Morales* (2001) 25 Cal.4th 34, 44.)

A. The prosecutor did not misstate the law of attempted burglary.

Defendant contends the prosecutor misstated the law when she argued the following proved defendant committed an attempted burglary: "[I]t is literally the touching of the backyard bedroom window screen. That is the intent furthered by the cut into that screen. The defendant took a direct but ineffective step to committing the first degree residential burglary and he intended to commit that first degree residential burglary. The defendant is in the backyard that he is not allowed to be there. He wasn't given consent to be there. He has no reason being there. And then he goes to the backyard bedroom window and he opens it and gets inside. The intent is done. When he's right

there and touches the screen, the intent is done." As defendant asserts, "Attempted burglary requires two elements: (1) the specific intent to commit burglary and (2) a direct but ineffectual act toward its commission. [Citation.] Burglary ordinarily requires (1) unlawful entry into a building with (2) the intent to commit theft or any felony." (*People v. Mejia* (2012) 211 Cal.App.4th 586, 605.) We fail to see any misstatement of the law in the prosecutor's argument that certain facts (touching and cutting the screen) proved defendant committed an attempted burglary.

B. The prosecutor did not trivialize the burden of proof.

During closing argument, the prosecutor offered the following "example" of reasonable doubt: "[L]et's say . . . you're driving . . . . As you're heading . . . to the intersection, you stop at a light. The light is red. The traffic that's going east and west is going because the light[s] facing them are green. Your light now turns green. You proceed . . . to that intersection now because it's beyond a reasonable doubt that the light facing east and west is now red." In rebuttal she reminded the jury reasonable doubt "is the highest burden . . . but it's not unreachable. You can get there just like driving."

Defendant contends the driving example trivialized the reasonable doubt standard. He concedes that defense counsel did not object to this argument, but asserts the claim is cognizable on appeal because of the importance of the burden of proof and because any objection would have been futile. Alternatively, he argues that if the failure to object constitutes a forfeiture, counsel was ineffective for remaining silent. We agree with the Attorney General that defendant failed to preserve the issue for appeal. (*People v. Morales*, *supra*, 25 Cal.4th at pp. 43-44) We also conclude that counsel's failure to object, if deficient, was not prejudicial. (See *Strickland v. Washington* (1984) 466 U.S. 668, 688 [appellant claiming ineffective assistance of counsel has the burden to show counsel's performance was deficient and the deficient performance resulted in prejudice].)

Assuming the prosecutor's comparison of the reasonable doubt standard to everyday decisions made while stopping at a traffic signal trivialized the standard, there is no basis to conclude the jurors applied an incorrect standard. The trial court correctly

instructed the jury regarding the definition of reasonable doubt, and the jury received written instructions to take to the jury room. The prosecutor also told the jurors, "You have been given an instruction on reasonable doubt" and confirmed that "[r]easonable doubt is an abiding conviction [in] the truth of the fact." The jurors were also advised that if anything said by counsel in their closing arguments conflicted with the trial court's instructions regarding the law, they were required to follow the instructions. A jury is presumed to follow its instructions. Moreover, "arguments of counsel generally carry less weight with a jury than do instructions from the court." (*Boyde v. California* (1990) 494 U.S. 370, 384.) Accordingly, defendant was not prejudiced by counsel's failure to object to the prosecutor's analogy.

C. The prosecutor's argument did not lessen the burden of proof.

In closing, the prosecutor focused on the fingerprint evidence. The prosecutor argued, "[The expert] testified that she received [the fingerprint cards] and she then, based on her training and experience, she compared and did the methodology that she is trained to do. And, as a result, she came back with two prints . . . of the defendant . . . . [¶] Besides that, there is no other reasonable defense. The defendant's prints are there. Items are missing. It's common sense. Connect the dots. [¶] There is no other explanation . . . for the defendant's left palm and right fingerprint to be on that window screen. So, therefore, there is no defense to this case. [¶] There was nothing to contradict [the expert's] findings." Defendant contends this argument improperly lessened the burden of proof. We disagree.

"A prosecutor may fairly comment on and argue any reasonable inferences from the evidence. [Citation.] Comments on the state of the evidence or on the defense's failure to call logical witnesses, introduce material evidence, or rebut the People's case are generally permissible. [Citation.] However, a prosecutor may not suggest that 'a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence.' " (*People v. Woods* (2006) 146 Cal.App.4th 106, 112.)

Here, "the prosecutor did not cross the critical line, as there is no reasonable likelihood the jurors would have understood the prosecutor's argument as imposing any burden on

defendant." (*People v. Young* (2005) 34 Cal.4th 1149, 1196.) "A distinction clearly exists between the permissible comment that a defendant has not produced any evidence, and on the other hand an improper statement that a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1340.)

4. *The trial court's questions to the witness do not reflect a lack of impartiality.*

A trial judge has a duty to control trial proceedings to promote "expeditious and effective ascertainment of the truth regarding the matters involved." (*People v. Pierce* (1970) 11 Cal.App.3d 313, 321.) "A trial court has both the discretion and the duty to ask questions of witnesses provided this is done in an effort to elicit material facts or to clarify confusing or unclear testimony." (*People v. Cook* (2006) 39 Cal.4th 566, 597.) "The mere fact that a judge examines a witness at some length does not establish misconduct." (*People v. Pierce, supra*, at p. 321.) However, "excessive questioning that virtually takes the witness out of counsel's hands" is considered improper. (5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 544.)

In reviewing a trial judge's questioning of a witness, the appellate court does not " 'determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial. [Citation.]' [Citation.] . . . [A] violation occurs only where the judge ' "officiously and unnecessarily usurp[ed] the duties of the prosecutor . . . and in doing so create[d] the impression that he [was] allying himself with the prosecution." ' " (*People v. Harris* (2005) 37 Cal.4th 310, 347.) Generally, "a judge's examination of a witness may not be assigned as error on appeal where no objection was made when the questioning occurred." (*People v. Corrigan* (1957) 48 Cal.2d 551, 556.)

Defendant contends the court violated his federal constitutional right to an impartial judge and California constitutional and statutory protections against excessive judicial participation by actively participating in the questioning of the prosecution's witnesses. He acknowledges that he did not object to the court's questioning on this

ground but argues the failure to object should not preclude review because an objection would have been futile. He notes that he did object to one of the court's questions on relevance grounds but the court overruled his objection. We fail to see how the court's ruling on his single relevance objection demonstrates that an objection based on the court's excessive participation would have been futile. Accordingly, the objection has been forfeited.

In any event, without addressing each question in detail, our review of the record indicates that none of the court's individual questions was improper and that collectively they did not give the impression that the court was favoring the prosecution's case. Some of the questions reflect, at most, a poor attempt to inject humor into the testimony. For example, when the prosecutor asked the crime scene technician if there is a difference between fingerprints and palm prints, the court interrupted, saying "I assume for starters they're bigger." When the expert said it depends on the size of the hand, the court asked if he had ever seen a finger print bigger than a person's palm. Similarly, when the technician testified that he collected prints from the bottom left corner of the "screen" the court asked if he meant the frame, adding that he could not "imagine that fingerprints do really well right on top of a screen." Others were clearly designed to offer clarification. For example, when the technician testified about lifting "usable" prints, the court sought to clarify that usable means a print "that has enough detail in it that an examiner . . . might be able to have an opinion about it." When the prosecutor asked the victim if he had given anybody by the name of Joseph Pulidio permission to be in his back yard or house, the court interrupted to ask "Just to make sure it's clear. The gentleman there that . . . was pointed out to you whether or not you know his name, has that person ever gotten permission from you to be in your house or your yard?" Even the court's most active questioning of the fingerprint expert was designed to help understand the expert's testimony. For example, the court asked if she had used "any sort of microscope or other instrumentation when you do the comparison?" and whether she used "any enhancement like that in this comparison." After a juror asked whether particular minutia are more valuable in making an identification, the court asked "I take it that people in your field

that do this type of analysis all agree that these points are the points that you use in making a comparative analysis and identification, right?"

There was no violation of defendant's right to a fair and impartial judge.

5. *Defendant is entitled to additional custody credits*.

Defendant contends, and the Attorney General agrees, that he is entitled to an additional 1,264 days of credit for the time in custody between his conviction in the Santa Clara County case and the entry of judgment in this case. In sentencing defendant, the court acknowledged that defendant was entitled to custody credits based on his time in custody following his Santa Clara conviction, but concluded it was not required to recompute his custody credits because the California Department of Corrections had "sole responsibility" for computing credits following the first sentence that was imposed in Santa Clara. The parties agree that when the court modified the prior judgment and imposed a new aggregate sentence, the court was required to recompute his custody credits and ensure that the credits were included in the new abstract of judgment. (See Pen. Code, §§ 2900.1, 2900.5; *People v. Saibu* (2011) 191 Cal.App.4th 1005, 1012-1013.) Accordingly, the abstract of judgment should be amended to include the custody credits defendant earned in the Santa Clara case between July 28, 2014, and January 12, 2018, which totals 1,264 days.

6. *Defendant has forfeited his challenge to fees and fines imposed at sentencing*.

Defendant was ordered to pay a restitution fine of $840 (Pen. Code, § 1202.4), $120 in court operations assessments (Pen. Code, § 1465.8), and $90 in criminal court assessments (Gov. Code, § 70373). The trial court ordered the assessments and set the restitution amounts without any express inquiry into defendant's ability to pay. Relying on the recent appellate decision in *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), defendant asserts that the imposition of these fines and assessments without a hearing establishing his ability to pay was a violation of his right to due process of law.

In *Dueñas*, the court held that due process requires a trial court to conduct a hearing to ascertain a defendant's ability to pay before imposing court facilities and court operations assessments under Penal Code section 1465.8 and Government Code

section 70373. (*Dueñas, supra,* 30 Cal.App.5th at p. 1164.) *Dueñas* further held that restitution fines under Penal Code section 1202.4 must be imposed but stayed unless and until the People demonstrate that a defendant has the ability to pay the fine. (*Id.* at pp. 1172–1173.)

Defendant acknowledges that he did not object to the fees and fines in the trial court, but argues his claim is cognizable because *Dueñas* presented an unforeseen change in the law. Courts after *Dueñas* have reached different conclusions on the issue of whether failure to object constitutes forfeiture of such an objection. (Compare *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1155 [finding forfeiture, as "Dueñas applied law that was old, not new"] with *People v. Castellano* (2019) 33 Cal.App.5th 485, 489 [declining to find forfeiture despite failure to object].) We agree with the approach taken by the court in *People v. Johnson* (2019) 35 Cal.App.5th 134. There, another panel of this Division explained that failure to object to restitution fines above the $300 statutory minimum set forth in subdivision (b)(1) of Penal Code section 1202.4, may constitute forfeiture because subdivision (c) of section 1202.4 allowed trial courts to consider a defendant's ability to pay more than the minimum fine even before *Dueñas*. (35 Cal.App.5th at p. 138, fn. 5.) The court explained, "For restitution fines *above* the statutory minimum, the statutory scheme expressly permits sentencing courts to take the defendant's ability to pay into account in setting the fine. (See Pen. Code, § 1202.4, subd. (c) ['[i]nability to pay may be considered . . . in increasing the amount of the restitution fine in excess of the minimum fine pursuant to paragraph (1) of subdivision (b)'].) The distinction between minimum and above minimum restitution fines has consequences for the applicability of forfeiture doctrine. Had the court imposed a restitution fine on Johnson above the statutory minimum, we would have come to the opposite conclusion on the issue of forfeiture, at least for purposes of that fine, since, there, it could be said that he passed on the opportunity to object for lack of ability to pay." (*Ibid*.) Because the court in this case imposed a restitution fine above the statutory

minimum, we follow the rationale in *Johnson* and find that defendant has forfeited his challenge to this fine.[1]

As to the court operations assessments and criminal conviction assessments, we agree with *Johnson's* approach in finding any error harmless. (*People v. Johnson, supra*, 35 Cal.App.5th 134.) Even if the trial court should have conducted an ability to pay hearing before imposing such fees under *Dueñas*, these assessments total $210, a debt defendant surely can satisfy through his earnings while in prison. (*Johnson*, at pp. 139-140.) Any error in failing to conduct an ability to pay hearing is thus harmless.

Disposition

The judgment is affirmed and the matter remanded with instructions to the trial court to amend the abstract to reflect the proper custody credits.

POLLAK, P. J.

WE CONCUR:

TUCHER, J.
BROWN, J.

[1] Defendant's argument that his claim is cognizable because an unauthorized sentence is subject to correction at any time fails for the same reason. (See *People v. Avila* (2009) 46 Cal.4th 680, 729 [forfeiture rule applies to defendant's claim that restitution fine amounts to an unauthorized sentence based on his inability to pay].)